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## NEW CONSTITUTIONAL TENDENCIES IN HISPANIC AMERICA<sup>1</sup>

There exists, and every student of political subjects may easily remark it, a sort of contrast between the newest constitutional tendencies in Latin America and the public methods followed in the countries belonging to this same ethnical group, more properly called "Hispanic" or rather "Iberian" America. In these countries, circumstances—as in the United States—have been conspiring in favor of the strengthening of the influence of the executive power, whilst their fundamental laws are trying to devise further guarantees on behalf of the independence of the legislative assemblies as chiefly embodying popular will through their respective majorities.

The American constitution even originally endowed the federal senate with a sort, we may say, of active participation in the functions of the executive, which could never be eliminated, and quite recently reaffirmed itself in a conspicuous manner. Such a political tradition represents a barrier against possible presidential encroachments, at least in that which concerns the management of foreign relations, which is missing in other political organizations where foreign policy is exclusively molded by the president, not to speak of domestic policy.

Treaties, it is true, are once signed, subject to the approval of congress, but congress is, in fact, a stranger to their making, or better, the spirit of their making. Again, as regards internal affairs, we meet, in the most advanced of the Hispanic American countries, with frequent interventions of the federal authority in the provinces, under pretext of safeguarding institutions—as happens regularly in the Argentine Republic—and with an ill-disguised meddling by the president in the composition of every

<sup>1</sup> Paper read at the meeting of the American Bar Association in Cincinnati, August-September, 1921, Section of Comparative Law.

new congress, in adjusting the electoral results at his own pleasure or convenience, although these are not always the expression of the truth but rather of official pressure.

Hamilton conceived in his time of a strong executive in order to prevent national dissolution, but he certainly did not foresee, when framing his constitutional statute, the military or civil dictators of our continent. These dictators have finished by frightening our political communities to such an extent that the new constitutions of Mexico and Peru exclude all officers in active service or previous revolutionary leaders from entering upon the functions of president.

The French, however, are accustomed to say "*il y a avec le ciel des accommodements*." If this is true, there must certainly be also *des accommodements* with human laws, which may be interpreted according to the circumstances or preferences of the moment. Revolutionary leaders in most republics will never forsake their rights to presidential priority, and, in some of them, retired officers have been returned by decision of congress to their former commands in time of peace, without any motive of war. Yet those symptoms are good; they show that at least the diagnosis is being rightly established.

The constitution of the United States was more or less imitated by the Hispanic American countries, even by Brazil when the empire gave way to a republic in 1889. The only government in the New World left with a semblance of parliamentary character—and I say a semblance, because Brazil was the only country which really transplanted British institutions to the political soil of South America—was Chile. Coincident with the period when Brazil drafted its new constitution of a presidential type, the fierce struggle began in Chile between the executive and the legislative. This was led by Balmaceda, who did not approve of either president or congress having the power to assume legally the dictatorship, but insisted instead on building for his country a system, as he expressed it, of mutual independence on the ground of popular liberty.

The standard of constitutional revision which, as Balmaceda wrote in his political will, had fallen on the battlefield all stained

with blood, has been raised thirty years later by the present Chilean president, Señor Alessandri, who is endeavoring to make effective the personal responsibility of the president. This chief magistrate in Chile can now only be indicted by the chamber of deputies and judged by the senate after the expiration of his term of office. During his tenure of office his secretaries, like the ministers of a constitutional monarch—the king of England or the king of Spain, for instance—are those who assume before congress the responsibility of their acts, individual or collective.

Such a system shows a lack of logic. In the words of an Argentine professor of constitutional law, González Calderón, it corresponds to crowning an extensive personal authority, we may say, a dictatorial one, with a Phrygian cap. If the president possesses a strong personality, he is apt to go beyond his legal limitations and to grasp an illegal monopoly of power, becoming a despot in the light of the constitution, because he does not dispose of the right of dissolving parliament and consulting the nation.

This is what happened with Balmaceda. A legislative assembly, favored with such an immunity, turns itself easily into a convention and governs by itself, in opposition to the executive and even in opposition to public opinion. Under such conditions, we can not call the Chilean system a true parliamentary government, and the best proof of its inconsequence lies in its well known ministerial instability which produces very frequent changes of cabinet—a pathological condition, to use the words of President Alessandri, conducive to anarchy.

The actual president of Chile is for the present sharpening his weapons against the senate, whose political influence he considers excessive and would like to see curtailed in order that the senate may become a conservative reviewing chamber with its own sphere of action clearly marked out, leaving to the executive a similar freedom of movement.

Thus the senate would play the role of a *pouvoir modérateur*, similar to the one wisely conceived by Benjamin Constant as a substitution for the former absolute crown. If Chile suffers

from inconstancy in the administration of its government because of too frequent changes in its high personnel, other Hispanic American countries, where normality is not as yet the rule, suffer from too prolonged terms of power by a single official. This is the reason why such countries are trying to provide the presidential system with checks that may prevent it from overstepping its proper nature and recognized character.

Almost all the constitutions in existence at the present time in Hispanic America contain a clause forbidding the election of a president to succeed himself. This reveals a suspicion that they may be tempted to make use of their official prestige for that purpose. According to the new constitution of Mexico, a citizen may be president only once. This clause has, however, so to say a personal feature and does not properly affect the public or political aspect of the case.

The tendency is general, in fact, to increase the sphere of the central authority and render it not only broader but more vigorous, at the expense of the provincial, and especially of the municipal, governments. Even in Brazil, the central authority has become more effective—really if not nominally—under the federated republic than it was under the empire which was said to be centralized, its provinces enjoying by law a limited autonomy which was corrected by a traditional feeling of independence, considered less necessary in a democracy.

Another South American country, Peru, has given, however, through its constitution of 1920, a decided move forward along the pathway toward parliamentary government, by making the cabinet depend on a vote of confidence by the assembly of representatives. Not satisfied with that even, the new constitution endeavored, so to say, to restrain the action of the president by means of a council of state appointed by the cabinet with the approval of the senate.

During the empire, Brazil possessed a council of state which aided the sovereign by its counsel, and composed, as it was, of men of the first class who were chosen from the administration or amongst the lawyers, effectively enlightened public questions by means of their admirable reports. This council of state con-

tributed in such manner, although perhaps less than the French council conceived by Napoleon, in the framing of legislation by preparing the bills submitted by the executive to the legislative body.

We are led to inquire whether all these constitutional changes which take place in civilized societies, and which are the outcome of their progress, are not of a purely academic nature, although answering definite tendencies determined by political events. Every constitutional clause is susceptible, not only of being misconstrued or disused—I am told that in the United States (the model for constitutional countries) the electoral franchise is not the privilege of all citizens, and that equality is in a certain sense a delusion—but of being suppressed under too frequent proclamations of a state of siege.

But does this happen exclusively in Hispanic America? The last war has taught—it has at least taught me—a few things. To begin with, previous to the war, I thought mankind much better, although not so good as the philosophers of the school of Rousseau considered it. Then, too, I firmly believed in freedom. But all on a sudden, when it seemed to me that liberties were most necessary, I saw every one of them suspended: liberty of locomotion: liberty of trading; liberty of industry; liberty of opinion; liberty of communicating one's impressions to his friends; liberty, even, of thinking, and not only of thinking aloud.

The Inquisition, of which some make a charge against the countries of south Europe, especially Spain and Portugal, was not more severe nor more inhuman, and it confined its repression to religious heresies. Political heterodoxy has been treated just as badly in our time, and in the international sphere, even neutrality was dealt with as a crime of treason against one or the other side of the belligerents.

The greatest surprise I experienced was to see that such things happened, not in Germany, which schoolbooks and daily papers branded as an autocracy, nor in France only, where justice has sometimes been notoriously superseded by patriotism, but in the English-speaking democracies, so proud of their traditional

liberties, yet as ready as any other to renounce them in times of trouble and to allow the notion of State to acquire a Prussian, or, let us say, in a more flattering manner, a Roman appearance, and trample on individual guarantees.

The newest constitutions in Hispanic America show, as if to redeem themselves from their eventual political fallacy, a feature hitherto absent from such pacts, even when they assume the name of "social contract" and are not, as in contemporary Russia, the reflection of a destructive communism. That feature is precisely a socialist one, of a frank antiplutocratic character, comprising all forms of legislation on behalf of the working classes—as is the case with the Mexican constitution—or abolishing all test of revenue as a condition for election, including a progressive income tax and defining the fundamental principles of protection of labor—as in the Peruvian constitution, notwithstanding the aristocratic type of that country.

Democracy has been the sign of Hispanic America, though that called by the Venezuelan author, Vallenilla Lanz, "democratic caesarism" has not been scarce. But now social democracy is rapidly becoming the rule under the form of state socialism which Germany was the first to apply wisely in modern times, and which is still the best European safeguard against the perils of anarchy.

MANOEL DE OLIVEIRA LIMA.